No. 14-1470

In the Supreme Court of the United States

William Robert Bernard, Jr.,
Petitioner,

v.

State of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

JAMES C. BACKSTROM
Dakota County Attorney

PHILLIP D. PROKOPOWICZ
Counsel of Record
Chief Deputy County Attorney
Dakota County Judicial Center
1560 Highway 55
Hastings, Minnesota 55033
(651) 438-4438
phil.prokopowicz@co.dakota.mn.us

Attorneys for Respondent

2015 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTION PRESENTED FOR REVIEW

Respondent objects to Petitioner's question presented as it fails to accurately reflect the scope and application of the Minnesota Supreme Court's decision in *Bernard*.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

JURISDICTION.....1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE AND FACTS.....1

REASONS FOR DENYING THE PETITION.....3

CONCLUSION.....9

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS

Arizona v. Gant, 556 U.S. 332 (2009).....8

Maryland v. King, 133 S. Ct. 1958 (2013).....7

Missouri v. McNeely, 133 S. Ct. 1552 (2013).....5

United States v. Robinson, 414 U.S. 218 (1973).....6, 7

FEDERAL COURT DECISIONS

Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986).....8

Byrd v. Clark, 783 F.2d 1002 (11th Cir. 1986).....8

Hoover v. Ohio, No. 13-3330 (6th Cir. Dec. 4, 2013)...5

United States v. Muir, No. 8:13-mj-03005-TMD (D. Md May 7, 2015).....5

United States v. Reid, 929 F.2d 990 (4th Cir. 1991).....8

MINNESOTA DECISIONS

State v. Bernard, 859 N.W.2d 762 (Minn. 2015).....*passim*

OTHER STATE DECISIONS

Commonwealth, Dep't of Transp. v. McFarren, 514 Pa. 411, 525 A.2d 1185 (1987).....9

Hawai'i v. Yong Shik Won,
134 Hawai'i 59 (2014).....5

Missouri v. Dowdy,
332 S.W.3d 868 (Mo. Ct. App. 2011).....9

North Dakota v. Birchfield,
858 N.W.2d 302 (N.D. 2015).....4

Ohio v. Hill, No. 2008-CA-0011,
(Ohio Ct. App. May 22, 2009).....9

Williams v. Florida, No. 5D14-3543
(Fla. Dist. Ct. App. June 5, 2015).....5

Wing v. Alaska,
268 P.3d 1105 (Alaska Ct. App. 2012).....8

MINNESOTA STATUTES

Minn. Stat. § 169A.20, subd. 2 (2013).....2

Minn. Stat. § 169A.24, subd. 1(1)-(2) (2013).....2

Minn. Stat. § 169A.276, subd. 1(a) (2013).....2

RULES

Supreme Court Rule 10(b).....4

Supreme Court Rule 10(c).....6

JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees with the statutory and constitutional provisions contained in the Petition.

STATEMENT OF THE CASE AND FACTS

On August 5, 2012, at approximately 7:00 p.m. officers were dispatched to a Department of Natural Resources boat launch in South Saint Paul, Dakota County, Minnesota, on a report of three intoxicated males attempting to extract a boat out of the water with a truck. Officers were informed that the truck became stuck in the process. Upon receiving this information, law enforcement officers responded to the scene. Upon their arrival, a witness directed them to three males that appeared to be intoxicated. The three males were located near a truck stuck on the edge of the boat launch. Officers smelled an odor of alcoholic beverage coming from the males. Each of the males denied driving the truck. Two witnesses on scene identified the driver of the truck as the male wearing solely his underwear. A witness additionally advised that the underwear-clad male was stumbling as he walked from the boat to the truck. The underwear-clad male was later identified as the Petitioner.

Officers made contact with Petitioner. A strong odor of alcoholic beverage emanated from his

breath. Additionally, Petitioner's eyes were bloodshot and watery. Petitioner admitted to drinking alcohol but denied driving the truck. Officers located the keys to the vehicle in Petitioner's hand. Officers requested that Petitioner perform field sobriety tests but he refused. Officers then took Petitioner into custody and transported him to the South Saint Paul Police Department where he was read the Minnesota Implied Consent Advisory. Officers asked Petitioner to take a breath test; he refused stating, "I have no reason to take one."

Based on the officer's probable cause to believe that the Petitioner was operating a motor vehicle under the influence of alcohol and his subsequent refusal to submit to the breath test along with his three prior impaired driving convictions, the State charged Petitioner with two counts of First-Degree Driving While Impaired—Test Refusal in violation of Minn. Stat. §§ 169A.20, subd. 2 (2013); § 169A.24, subd. 1(1)-(2) (2013); 169A.276, subd. 1(a) (2013).[1]

The trial court found that the officer had probable cause to arrest the Petitioner, but dismissed the State's case, finding that the officer did not have a lawful basis to request the Petitioner to submit to a breath test. The Minnesota Court of Appeals reversed the lower court, finding the officer had a lawful basis to request a chemical test from the Petitioner because officers had probable cause to believe Petitioner violated Minnesota's Driving While Impaired (DWI) laws and could have obtained a search warrant to obtain a biological sample to

---

[1] At the time of arrest, Petitioner had three or more prior driving while impaired convictions within ten years plus a previous felony DWI conviction making the instant offense a felony under Minn. Stat. § 169A.20, subd. 2 (2013); § 169A.24, subd. 1(1)-(2) (2013).

determine his blood alcohol concentration. The Minnesota Supreme Court granted review and affirmed, finding that the refusal statute is constitutional as applied to the Petitioner. The Minnesota Supreme Court affirmed the decision on grounds other than those expressed by the intermediate appellate court. The Minnesota Supreme Court specifically held that a warrantless search of the Petitioner's breath would have been constitutional as a search-incident-to-a-valid-arrest.

REASONS FOR DENYING THE PETITION

A. Petitioner's proposed question for review fails to accurately reflect the scope and application of the Minnesota Supreme Court's decision in *Bernard* and requires factual and legal analysis not reviewed or ruled upon by the Minnesota Supreme Court.

The Minnesota Supreme Court carefully articulates that *Bernard's* holding, which upholds the constitutionality of Minnesota's law that makes it a crime to refuse chemical testing, is limited to situations in which there has been a ***lawful arrest*** for DWI and the person has refused to take a ***breath test***. *State v. Bernard*, 859 N.W.2d 762, 768, 772 (Minn. 2015) (emphasis added). The Minnesota Supreme Court specifically stated that its ruling does not express an opinion as to whether a request for a blood or urine test could be justified under the search-incident-to-lawful-arrest exception. *Id.* at 768, n.6. However, Petitioner's proposed question for review implies that the Minnesota Supreme Court intended that its ruling apply to all chemical testing,

including blood test requests, irrespective of whether the person has been lawfully arrested. This overbroad analysis of *Bernard's* holding leads to legal argument and analysis not discussed by the Minnesota Supreme Court. If the petition is granted, the parties and this Court will be required to engage in unwarranted speculative discussions and arguments as to the scope and application of *Bernard* and the Fourth Amendment.

B. Minnesota's decision in *Bernard* does not conflict with the decisions of other state courts of last resort regarding the constitutionality of the criminalization of a DWI refusal.

The Minnesota Supreme Court has not decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. *See* Supreme Court Rule 10(b). Respondent is aware of only one other state court of last resort that has reviewed the specific issue addressed in *Bernard*. *See North Dakota v. Birchfield*, 858 N.W.2d 302 (N.D. 2015), *Pet. for Cert. Docketed* June 16, 2015. The *Birchfield* court held that North Dakota's refusal statute was constitutional facially and as-applied to defendant-appellant because it satisfied the general reasonableness requirement of the Fourth Amendment.[2] *Id.* at 310. Accordingly, the North Dakota Supreme Court, while providing alternative grounds for upholding the constitutionality of its

---

[2] The *Birchfield* court does not articulate what specific chemical test was requested from the defendant-appellant and their result does not distinguish between a breath, blood or urine chemical test.

state's law making it a crime to refuse chemical testing, is not in direct conflict with the Minnesota Supreme Court's reasoning in *Bernard*.

Moreover, several lower courts within different states[3] have also reviewed their respective refusal statutes and all have upheld the constitutionality via a Fourth Amendment analysis. The Hawaii Intermediate Court of Appeals reviewed the constitutionality of Hawaii's refusal statute in *Hawai'i v. Yong Shik Won*,[4] 134 Hawai'i 59 (2014), *cert. granted* on June 24, 2014. The *Won* court held that Hawaii's refusal statute is constitutional finding that it was reasonable under the Fourth Amendment. Florida's Fifth District Court of Appeal reviewed the constitutionality of Florida's refusal statute. *Williams v. Florida*, No. 5D14-3543 (Fla. Dist. Ct. App. June 5, 2015).[5] The *Williams* court upheld

---

[3] Additional jurisdictions have issued unreported decisions upholding the validity of DWI refusal statutes under a Fourth Amendment analysis. *See Hoover v. Ohio*, No. 13-3330 (6th Cir. Dec. 4, 2013) (The imposition of increased penalties for refusal to submit to a breath test was reasonable and did not violate the petitioner-appellant's Fourth Amendment rights). A similar issue was raised in *United States v. Muir*, No. 8:13-mj-03005-TMD (D. Md May 7, 2015) (The court did not find the refusal statute unconstitutional).

[4] Defendant-appellant did not refuse a chemical test; he agreed to submit to a breath test after an officer read Hawaii's Implied Consent Advisory. *Won*, 134 Hawai'i at 62. Defendant-appellant declined to take a blood test. *Id.* Based on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), defendant-appellant argued that Hawaii's refusal statute was unconstitutional and given that, he was misinformed of the sanctions for refusing to submit to testing since the implied consent form referred to sanctions for a chemical test refusal. *Won*, 134 Hawai'i at 61.

[5] This opinion has not been released for publication in the permanent law reports.

Florida's refusal statute based upon the general reasonableness under the Fourth Amendment.

Because the Minnesota Supreme Court's decision in *Bernard* clearly does not conflict with the decision of another state court of last resort or of a United States court of appeals, this Court should deny the petition.

C. Minnesota's narrowly tailored decision in *Bernard* is consistent with this Court's previous decisions related to the scope of searches incident to arrest.

In *Bernard*, the Minnesota Supreme Court did not decide an important federal question in a way that conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10(c). *Bernard* narrows the application of its holding to the criminalization of breath test refusals after a lawful DWI arrest. In reaching its decision, the Minnesota Supreme Court analyzed and relied on the United States Supreme Court opinion in *United States v. Robinson*, 414 U.S. 218 (1973). The *Bernard* court concluded that the United States Supreme Court decision in *Robinson* is still good law, including a determination that searches of a person incident to arrest "are reasonable regardless of the probability in a particular arrest situation that weapons or evidence would in fact be found." *Bernard*, 859 N.W.2d at 770, *quoting Robinson*, 414 U.S. at 235 (quotation marks omitted). In doing so, the Minnesota Supreme Court noted that "[T]he breath test was a search of Bernard's person that would have been no more intrusive than the myriad of other searches of the body that we and other courts have upheld as searches incident to a valid arrest." *Bernard*, 859

N.W.2d at 772. Therefore, far from overruling or narrowing *Robinson*, the Court recognized again *Robinson's* 'categorical rule,' which allows a search of the person of an arrestee justified only by the custodial arrest itself.

> We therefore conclude that a breath test is a search of the arrestee's person and is justified by virtue of the lawful arrest itself. As a result, we hold that a warrantless breath test of Bernard would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement.

Bernard, 859 N.W.2d at 772.[6]

Petitioner suggests that *Bernard* is in conflict with recent United States Supreme Court rulings related to searches incident to arrest. However, in *Bernard*, the court conducts a painstaking analysis to show that their decision is consistent with Fourth Amendment jurisprudence related to searches incident to arrest. The Minnesota Supreme Court specifically indicated that its analysis is applicable only to searches within the ***body*** for breath requests[7]

---

[6] Although not specifically referenced by the Minnesota Supreme Court, the decision is also consistent with the United States Supreme Court decision and reasoning expressed in *Maryland v. King*, 133 S. Ct. 1958 (2013) (Use of a buccal swab to collect a DNA sample for a person arrested for a serious offense is a reasonable search under the Fourth Amendment).

[7] Footnote 6 specifically indicates that the analysis is based on the officer's request to submit to a breath test and this decision does not express an opinion as to whether a request for a blood or urine test could be justified as a search-incident-to-arrest. *Bernard* at 768.

and differentiates its decision from this Court's holdings related to searches involving the area in which the defendant was arrested. *See Arizona v. Gant*, 556 U.S. 332 (2009). The Minnesota Supreme Court in *Bernard* concedes that a search of Bernard's breath did not compel safety concerns for law enforcement or immediate preservation of evidence needs; however, this concession does not deviate from this Court's previous decisions. *Id. Bernard*, 859 N.W.2d at 765-72. The Minnesota Supreme Court distinguishes its ruling from this Court's decision in *Gant*, articulating that *Gant* did not address the search of a person, but focused on the search of the area from which the defendant was arrested, specifically the defendant's automobile. *Bernard*, 859 N.W.2d at 768. This is due to the separate analysis for a search of a person versus the search of the area surrounding a suspect. *Id.* at 768-69. The *Bernard* court concluded "that a warrantless breath test does not violate the Fourth Amendment because it falls under the search-incident-to-a-valid-arrest exception...[and it] is consistent with decisions from other courts."[8] *Id.* at 767 The *Bernard* court also

---

[8] *Bernard*, 859 N.W.2d at 767 cites the following cases supporting this contention: *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) (holding that breathalyzer tests were reasonable searches under the Fourth Amendment because they were searches incident to lawful arrests); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986) ("It is clear then that the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse."); *Byrd v. Clark*, 783 F.2d 1002, 1005 (11th Cir. 1986) (holding that "officers would have been justified in conducting a [breath] search" under the search-incident-to-arrest exception); *Wing v. Alaska*, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012) (holding that a breath test was a valid search incident to arrest); *Missouri v. Dowdy*, 332 S.W.3d 868, 870 (Mo. Ct. App. 2011)

determined that there was not "a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception." *Id.* at 767-68.

Because the Minnesota Supreme Court's decision in *Bernard* does not conflict in any way with relevant decisions of this Court, this Court should deny the petition.

CONCLUSION

No compelling reasons exist for this Court to grant the petition. Accordingly, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied in all respects.

Dated: July 15, 2015

(same); *Ohio v. Hill*, No. 2008-CA-0011, at *5 (Ohio Ct. App. May 22, 2009) (same); *Commonwealth, Dep't of Transp. v. McFarren*, 514 Pa. 411, 525 A.2d 1185, 1188 (1987) (same).

Respectfully submitted,

JAMES C. BACKSTROM
DAKOTA COUNTY ATTORNEY

By: Phillip D. Prokopowicz
Counsel of Record
Chief Deputy
Dakota County Attorney's Office
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033
Telephone: (651) 438-4438
phil.prokopowicz@co.dakota.mn.us